



# SHPC Legal Update

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## Massachusetts Employers Should Act Now To Ensure Compliance With New Pay Equity Law

By Jaimie A. McKean and Jaimeson E. Porter



Massachusetts recently amended its Pay Equity Law. The new law, which goes into effect on July 1, 2018, imposes significant responsibility on Massachusetts employers to ensure equal pay to employees of different genders for comparable work. Most notably, the law broadens the definition of comparable work, extends the statute of limitations and strengthens the remedies for

equal pay claims, and mandates greater transparency in employers' pay practices.

While the law imposes substantial new obligations on employers, it also allows employers to take proactive steps to protect themselves from equal pay claims in the future. Most notably, the law allows employers to conduct a self-evaluation, which may serve as a safe harbor defense. As a result, employers should consider conducting a self-evaluation now, especially employers that will be making salary changes or determinations in the next six months (such as schools, which typically set faculty and staff salaries for the following school year by March). Conducting a

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## New NLRB Majority Quickly Reverses Course On Obama-Era Holdings

By Brian D. Carlson



During the eight years of the Obama Administration, employers became accustomed to unfavorable news from the National Labor Relations Board ("NLRB" or the "Board"). With a Democratic majority, the Board issued many groundbreaking decisions apparently aimed at tilting the labor-management balance of power in favor of unions.

Now that President Trump has reconstituted the Board with a Republican majority, that trend has quickly begun shifting in the opposite direction. Within the past few months, the NLRB has overturned a number of significant Obama-era rulings, relating to joint employment, the composition of proposed bargaining units, employee handbooks, and other important issues. In addition, the Board has signaled that it may revisit the new, union-friendly election rules it put into place in 2015.

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**See back cover for upcoming seminars including the two-day Employment Law Boot Camp!**



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## Massachusetts Employers Should Act Now To Ensure Compliance With New Pay Equity Law

prompt self-evaluation will allow consideration of any pay differentials in making such salary decisions. Otherwise, employers may be faced with having to increase employee salaries a second time in order to comply with the new law's deadline of July 1, 2018.

### What Is Pay Equity?

Both federal and Massachusetts law prohibits employers from compensating men and women differently based on their gender for comparable or equal work. Massachusetts employers must comply with both the federal equal pay statute (29 U.S.C., § 206(d)) and the Massachusetts equal pay statute (M.G.L. c. 149, § 105A).

#### Current Federal Law.

Federal law prohibits employers from paying employees of the opposite sex differently for "equal work" on jobs that require "equal skill, effort, and responsibility" and are performed under "similar working conditions." Pay differentials are allowed where they are based on: (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) any other factor other than sex. The catch-all exception of "any other factors other than sex" under the federal law is a broad defense that many times allows employers to defend successfully against alleged pay disparity claims.

#### Current Massachusetts Law.

While Massachusetts law presently prohibits employers from paying employees of the opposite sex differently for "comparable work," this law is rarely used or enforced because courts narrowly define "comparable work" to only include jobs that have similar duties and require comparable skill, effort, responsibility, and working conditions. As a result, typically only those in the same position with very similar duties are considered

to be performing "comparable work." This law, however, will soon change.

### The New Massachusetts Law (Effective July 1, 2018).

On July 1, 2018, the new Massachusetts equal pay law goes into effect. The new law expands the state's existing equal pay protections by broadening the definition of "comparable work" under the statute.

Historically, the Massachusetts equal pay statute has not defined "comparable work." Over the years, and in the absence of any express definition, courts have interpreted "comparable work" to mean that: (1) two positions have the same (or very similar) substantive job duties; and (2) the two positions require comparable skill, effort, responsibility, and working conditions.

Come July 1, 2018, the meaning of "comparable work" and other important terms will be expressly defined in the statute. Employers will still be prohibited from paying employees of different sexes unequally for comparable work. However, job titles and duties will no longer be a determinative factor. Instead, the comparable work analysis will focus much more broadly on similarity of skill, effort, and responsibility, and working conditions required for positions, even where the job titles and duties of those positions are different. Unfortunately, this new, vague standard will make it difficult for employers to determine which jobs to compare for purposes of complying with the new law.

### What Employers Need To Know

Some of the most important changes in the new law that employers should be aware of include the following:

#### 1. "Comparable Work" Is Not Just About Job Titles Or Descriptions.

"Comparable work" will be work that requires substantially similar skills, effort,

and responsibility and that is performed under similar working conditions. "Working conditions" include the environmental circumstances usually taken into consideration in setting a salary or wages, such as shift differentials, or physical surroundings and hazards.

A job title or a job description alone does not determine comparability. Thus, employers should think about the true requirements for a position, and not just about what is on paper, when making pay decisions.

#### 2. "Wages" Means More Than Just Salary Or Hourly Rate.

Under the new law, "wages" includes "all forms of remuneration" for employment. When examining whether two positions are compensated equally, employers will need to assess not just salary or hourly pay, but all forms of compensation, including wages, benefits, bonuses, commissions, employee housing, tuition remission, and other fringe benefits.

#### 3. Six Exceptions Where Pay Differentials Are Permissible.

The new law provides for six (6) exceptions to the prohibition against unequal pay. A man and a woman may be paid different wages for comparable work if the pay difference is based on: (1) a system that rewards seniority with the employer; (2) a merit system; (3) a system that measures earnings by quantity or quality of production, sales, or revenue; (4) the geographic location of a job; (5) education, training, or experience, so long as it is reasonably related to the particular job in question; or (6) travel, if travel is a regular and necessary condition of the particular job in question.

Identifying and exploring which exceptions might apply will be critical for employers in evaluating potential pay disparities. Employers should examine their hiring policies and any performance-based

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pay increase criteria to see which of these systems, if any, are already in place.

### 4. Asking About Salary History Will Be Expressly Prohibited - Along With Several Other Employment Practices.

The new law prohibits employers from asking about a prospective employee's wage or salary history until after an offer of employment has been made, unless the prospective employee voluntarily discloses the information on his or her own. Given the new law's broad definition of "wages," it appears employers will not only be prohibited from asking about a candidate's previous salary, but also about other forms of past compensation, such as commissions or benefits. This restriction could present a difficult hurdle for employers hiring for roles where past compensation may be closely tied to performance measurement, such as sales roles.

The new law also prohibits employers from requiring that employees refrain from discussing or disclosing wage information. (In this respect, the law mirrors the National Labor Relations Act, which likewise gives employees the right to discuss their wages with co-workers.) However, nothing in the new law obligates an employer to disclose an employee's wage information to other employees or third parties. Similarly, employers can still require employees with access to pay information (like human resources professionals) to keep such information confidential unless written consent is obtained from an employee whose information is to be disclosed.

Retaliating against any employee for opposing unlawful practices, disclosing his or her own wages, or inquiring about or discussing the wages of another employee, is also expressly prohibited. Importantly, employers cannot implement policies or contract around the new law to avoid compliance with any of the law's protections or prohibited practices. Employers should make certain that both their formal policies and

their actual practices do not inappropriately silence employee wage discussions.

### 5. Employees Can Sue For Double Their Wages, Plus Their Legal Fees - Even If The Employer Had Good Intentions.

Employees can sue employers in court individually, or as part of a class action, within three years of the date of an alleged violation. A violation occurs each time the law is violated, so every discriminatory paycheck constitutes a violation.

An employer that violates the new law will be held liable for the employee's unpaid wages, and "liquidated damages" (or double damages), plus the employee's reasonable attorneys' fees and costs.

The statute makes clear that an employer's intent is irrelevant. Even an employer that unwittingly violates the law can be on the hook for double damages.

### 6. A Self-Evaluation Can Provide A Complete Defense For Employers.

Thankfully for employers, the new law provides employers with the opportunity to conduct a self-assessment, which may serve as a safe harbor defense. The law provides for two variations of safe harbor defenses: a full affirmative defense, and a partial defense.

An employer has the opportunity for a *Full Affirmative Defense* to liability if the employer can show: (a) it conducted a self-evaluation of its pay practices within three years prior to the legal action; (b) the self-evaluation was reasonable in detail and scope, in light of the employer's size; (c) the self-evaluation was conducted in good faith; and (d) reasonable progress has been made towards eliminating pay issues.

Where an employer's self-evaluation falls short of being reasonable in detail and scope, the employer still may have an opportunity for a *Partial Defense* under the new law. Specifically, if the employer can show the evaluation was done in good faith and reasonable progress has been made towards

fixing pay issues, the employer will avoid being held liable for double damages.

Importantly, a self-evaluation may not be used against an employer if a violation occurs before the employer's self-evaluation is completed, within six months of its completion, or within two years of its completion if the employer has implemented a plan to remedy wage issues in good faith.

### 7. Employers Cannot Reduce Current Employees' Wages In Order To Get In Compliance.

Employers that identify impermissible pay differentials will need to raise the bar, rather than lower it. Employers should keep this in mind when deciding whether to do a self-evaluation, and when designing their next budgets.

## Getting In Compliance: Steps Employers Can Take Now To Avoid Liability

To get in compliance with the new pay equity law, Massachusetts employers should consider the following steps:

- **Conduct a self-evaluation.** The evaluation needs to be conducted in good faith and be reasonable in detail and scope. Employers that will be making salary changes or determinations in the next six months should conduct a self-evaluation now, to allow consideration of pay differentials in making such salary decisions.
- **Employ a three-step analysis in conducting the self-evaluation:**

(1) Conduct an assessment of job classifications company-wide in order to identify comparable jobs. Gather information regarding the skill, effort, responsibility, and working conditions of all jobs company-wide. While employers will certainly want to review job descriptions and job duties to help

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assess job classifications, remember that job titles and duties will no longer be definitive in making classification determinations.

(2) Determine if comparable positions are paid equally. Calculate whether men and women in the job(s) compared are compensated the same. Evaluate the various forms of compensation offered to employees. Remember that compensation can include wages, benefits, commissions, and fringe benefits, including employee housing and tuition remission.

(3) Determine whether any of the exceptions apply, and if not, whether salary increases are appropriate. If employees in comparable jobs are not compensated the same, look for an explanation that could trigger any of the six exceptions. If no exception applies, and a pay bump is required for certain employees, establish a plan for implementing a pay increase. Be careful not to indirectly decrease other employees' pay.

- **Consider engaging counsel to assist with the self-evaluation.** While an employer's self-evaluation may not be entirely privileged, engaging counsel at the outset of the self-evaluation process will help ensure that the self-evaluation is comprehensive and legally compliant, and will increase the possibility that certain discussions and decision-making regarding the self-evaluation will be attorney-client privileged.
- **Be prepared for the employee response.** If a pay disparity is discovered, thus requiring a pay increase for certain employees to close the gap, proceed strategically in rolling out the pay increase, and be prepared to field employee questions and complaints.
- **Review current policies and examine how pay decisions are being made.** Employers should review (and update if necessary to comply with the new law): (1) employment applications and pre-employment inquiries; (2) hiring practices; (3) existing employee, faculty, and other handbooks and/or policies; and (4) existing pay structures.
- **Maintain pay equity going forward.** After fixing any pay issues, employers should repeat self-evaluations periodically so as not to end up back where they started. Employers should maintain and follow pay equity policies and conduct periodic trainings.

*If you have questions about how to conduct a pay equity self-evaluation, or whether your organization is in compliance with the new law, please feel free to contact us. We can walk you through the process and help you figure out the best course of action. ✨*

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## New NLRB Majority Quickly Reverses Course On Obama-Era Holdings

Below we summarize some of the most significant developments in these areas.

### Joint Employers

First, the Board recently issued a decision reversing its 2015 *Browning-Ferris Industries of California, Inc.* (“BFI”) decision, which had dramatically broadened the circumstances under which an employer could be found to be a “joint employer” of workers employed by another business. Specifically, in *BFI*, the Board ruled that if an employer merely has a right to control essential terms and conditions of employment for workers employed by another business, the employers may be considered a joint employer of those workers – regardless of whether the employer actually exercises any such control.

The *BFI* holding gave rise to great concern among employers, as it potentially encompassed a wide range of common business arrangements, such as employers' relationships with franchisees and staffing companies, as well as commercial contracts between companies with specifications relating to employee performance. In these and many other circumstances, an employer potentially could be obligated to bargain with another company's employees regarding the terms and conditions of their employment, despite its lack of any direct relationship with those employees. Similarly, an employer could potentially be found liable for unfair labor practices committed by another company over which the employer had no control.

To employers' relief, in a December 2017 decision, *HyBrand Industrial Contractors, Ltd.*, the Board overturned *BFI*, thereby returning to its prior, long-established joint-employer standard. Under the standard re-adopted in *HyBrand*, an employer must exercise *actual* control over workers' terms and conditions of employment in order to be considered a joint employer.

Unfortunately for employers, in late February of this year, the Board subsequently withdrew the *HyBrand* decision, based on an internal NLRB report that concluded that Member William Emanuel should have recused himself from the case, due to the fact that his former law firm had represented one of the parties in the *BFI* case. For the moment, then, the *BFI* holding has been reinstated.

Nonetheless, given the Board's new Republican majority, it seems likely that *BFI* will once again be reversed when an appropriate case is brought before the agency.

### “Micro” Bargaining Units

In another recent decision, *PCC Structural, Inc.*, the NLRB abrogated its 2011 *Specialty Healthcare and Rehabilitation Center of Mobile* decision, which made it much more difficult for an

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employer to challenge the composition of a union's proposed bargaining unit – particularly, a narrow, or “micro,” bargaining unit. (Unions often attempt to organize smaller bargaining units when they believe that only a segment of the employees in a particular department or classification are likely to vote in favor of unionization.)

Under *Specialty Healthcare*, in order to challenge a proposed bargaining unit, an employer was required to show that workers excluded from the proposed unit shared “an overwhelming community of interest” with those falling within it. This stringent standard made it very difficult for employers to challenge the composition of unions' proposed bargaining units. For instance, in a 2014 decision involving a Macy's department store, the Board gave its imprimatur to a proposed bargaining unit comprising only cosmetics and fragrance employees.

With the *PCC Structurals* decision, however, the Board has reinstated its previous standard for evaluating the appropriateness of unions' proposed bargaining units. Under this much more flexible standard, the Board will once again consider a number of factors, including the extent to which the employees at issue (i) are organized into a specific department, (ii) have distinct skills and training, (iii) have distinct job functions, (iv) are integrated functionally with other employees, (v) frequently have contact with other employees, (vi) frequently interchange with other employees, (vii) have terms and conditions of employment differing from those of other employees, and (viii) are supervised by different managers.

Thus, with the NLRB's reversal of course in this area, employers should have substantially greater latitude to challenge the manner in which unions seek to define proposed bargaining units.

### Employee Handbooks

The Board also recently issued a decision, *The Boeing Co.*, that will come as welcome news to employers in their efforts to imple-

ment and maintain effective personnel policies.

Under the Obama Administration, the Board issued a multitude of decisions striking down previously uncontroversial personnel policies – often included in employee handbooks – on the basis that such policies might inhibit employees' rights to engage in protected concerted activity (known as “Section 7 rights”). For instance, the Board frequently took fault with handbook policies requiring civility or respectful behavior in the workplace, prohibiting cameras or recording devices in workplaces, restricting social media postings by employees, and requiring that work-related information be kept confidential. Because employees enjoy Section 7 rights regardless of whether they are represented by a union, these rulings applied to unionized and non-unionized employees alike.

The Board's holdings in this area stemmed from its extremely broad application of a 2004 decision, *Lutheran Heritage Village-Livonia*, in which the NLRB held that a work rule that is facially neutral (*i.e.*, does not explicitly restrict employees' Section 7 rights) may nonetheless be found unlawful if employees would reasonably construe the rule as restricting their Section 7 rights.

In its recent *Boeing Co.* decision, however, the Board repudiated *Lutheran Heritage* in favor of a much more employer-friendly standard. Now, instead of considering only whether a work rule could reasonably be construed as improperly limiting Section 7 rights – a conclusion that decisions by the Obama Board often appeared to strain to reach – the NLRB will also evaluate (i) the nature and extent of the rule's potential impact on Section 7 rights, and (ii) any legitimate justifications underlying the rule.

This new standard should make it significantly more difficult for employees and unions to challenge facially neutral personnel policies. Indeed, the Board stated in its *Boeing Co.* decision that employer policies banning cameras in the workplace would henceforth be deemed *per se* lawful. (Obama-

era Board decisions had sometimes taken fault with no-camera policies, on the basis that they might infringe upon employees' rights to publicize demonstrations or other protected concerted activities.)

### Election Rules

Finally, in December 2017, the Board formally invited comments from interested parties as to whether it should revise or rescind the changes in union election procedures that the Board instituted in 2015. Those changes have significantly sped up the pace of union elections, thereby curtailing employers' ability to communicate their campaign messages to employees.

The Board's deadline for submission of comments was initially set for February 12, 2018, and subsequently extended to March 19, 2018. While there is no certainty as to what will happen, it will not come as any surprise if the new Board majority ultimately decides to rescind, or at least substantially revise, the 2015 election rule changes.

### Recommendations For Employers

We suggest that employers review, in consultation with labor counsel, these recent Board decisions and consider how their operations may be impacted. For instance, employers that have revised their employee handbook policies in recent years in response to unfavorable NLRB decisions may want to consider whether to revisit those changes, now that the new Board majority has signaled a very different approach in this area.

Employers would also be wise to closely monitor future Board decisions, as it is very likely that other notable Obama-era precedents will be similarly overturned.

*If you have any questions about these developments, please feel free to contact one of our experienced labor lawyers. We regularly assist employers with all types of union-related issues and would be pleased to help. ✨*



# Tips For Employers In Responding To Employee Personnel-Records Requests

By Jacqueline M. Robarge<sup>1</sup>



To many employers, responding to requests by current or former employees to review their personnel files might seem like a simple task. Such requests, however, involve important and

often subtle issues that employers need to consider carefully.

Many states – including five of the six New England states – have statutes governing how employers must respond to personnel records requests. These statutes often specify, for instance, which types of documents must be included in (or excluded from) an employee's personnel file; how quickly an employer must respond to an employee's personnel-file request; and how frequently employees are entitled to review their personnel files.

Following is a summary (which is not intended to be exhaustive) of these various New England personnel records statutes. It is important for employers to be aware of their obligations under these laws, and to ensure that their policies and practices are tailored accordingly.

## The Massachusetts Personnel Records Statute

Among the New England states, Massachusetts has the most detailed statute governing employee personnel records requests.

The Massachusetts Personnel Records Law, M.G.L. c. 149, § 52C, defines a "personnel record" as "a record kept by an employer that identifies an employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation or disciplinary action."

In addition to this general definition, the statute specifies various categories of documents that Massachusetts employers, with at least 20 employees, *must* keep in each employee's personnel file, until at least three years following termination of employment:

- Employee's name, address, and date of birth;
- Job title and description;
- Pay rate and any other compensation paid to the employee;
- Employment start date;
- Job application form;
- Resumes or similar documentation submitted by the employee;
- Performance evaluations;
- Written warnings;
- Documents listing any probationary periods;
- Waivers signed by the employee;
- Copies of dated termination notices; and
- Any other documents relating to disciplinary action regarding the employee.

The statute specifies that "personnel records" do not include information or documentation relating to a person other than the employee insofar as disclosure of the material would constitute "a clearly unwarranted invasion of such other person's privacy." This might include, for instance, sensitive information concerning a co-worker who complained about the employee.

Upon written request, a current or former Massachusetts employee must be allowed to review his or her personnel file within five days, during regular business hours, at the employee's regular place of employment. Additionally (or alternatively), an employee is entitled to receive copies of his or her personnel records within five days of a written request to the employer.

After reviewing his or her personnel records, if the employee disagrees with any information contained in the records, the employer and employee may agree to remove or correct the information. Absent such an agreement, the employee is entitled to submit a written statement explaining his or her position on the issue, which the employer must then maintain as part of the personnel file.

Under a 2010 amendment to the Massachusetts statute, whenever an employer places "negative" information into an employee's personnel file, the employer must notify the employee within ten days. This includes, for instance, disciplinary notices or memos, documents addressing attendance or performance issues, and correspondence between managers and Human Resources regarding inappropriate conduct on the employee's part.

Finally, an employee is entitled to review his or her personnel records on only two separate occasions during a calendar year. This limitation, however, does not apply to a request prompted by the placement of negative information in an employee's personnel file.

## Other New England Personnel Record Statutes

With the exception of Vermont, each of the other New England states has a similar statute addressing employees' rights to review their personnel records.

### Connecticut.

The Connecticut Personnel Files Act, Conn. Gen. Stat. § 31-128a, gives current and former employees the right to review their personnel files during regular business hours, at a location at or reasonably near their place of employment, within "a reasonable time" following a written request.

1. A previous version of this article appeared in New England In-House ("NEIH"). The Firm is grateful to NEIH for its support.

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## Tips For Employers In Responding To Employee Personnel-Records Requests

A Connecticut employee is also entitled to receive copies of his or her personnel records within “a reasonable time” following a written request to the employer. The employer may charge a reasonable fee for copying the records.

The Connecticut statute defines a “personnel file” as “papers, documents and reports pertaining to a particular employee which are used or have been used by an employer to determine such employee’s eligibility for employment, promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action including employee evaluations or reports relating to such employee’s character, credit and work habits.” Conversely, the statute specifically excludes various materials from the definition of a “personnel file,” including medical records, job references from third parties, stock option or bonus plans records, and documents relating to investigations of losses, misconduct, and suspected crimes.

Like the Massachusetts statute, the Connecticut statute entitles an employee to add to his or her personnel file a written statement addressing any information in the file with which the employee disagrees.

Finally, an employee in Connecticut is entitled to review his or her personnel file on only two separate occasions during a calendar year.

### Maine.

Maine’s personnel records statute, M.R.S.A. Title 26, §631, provides that within ten days following its receipt of a written request, an employer must permit a current or former employee to review and obtain copies of the documents in his or her personnel file. This right is limited to one request by an employee per calendar year.

The Maine statute provides that a “personnel file” includes, but is not limited to, “any formal or informal employee evalua-

tions and reports relating to the employee’s character, credit, work habits, compensation and benefits and non-privileged medical records or nurses station notes relating to the employee that the employer has in the employer’s possession.”

### New Hampshire.

The New Hampshire Employee Access to Personnel Files Law, N.H.R.S.A. §275:56, requires employers to provide employees with “a reasonable opportunity” to review and obtain copies of the documents in their personnel files. Although the statute does not define a “personnel file,” it specifically excludes certain types of materials, including health records and documents relating to a law enforcement or “government security” investigation.

Like the Massachusetts and Connecticut statutes, the New Hampshire law gives an employee who disagrees with information contained in his or her personnel file a right to add a written statement to the file explaining the employee’s position.

### Rhode Island.

Finally, Rhode Island’s Inspection of Personnel Files Law, R.I. Gen. Laws §28-6-1, provides that within seven business days following a written request, an employee must be allowed to review his or her “personnel files which are used or have been used to determine that employee’s qualifications for employment, promotion, additional compensation, termination, or disciplinary action.” This right is limited to three requests by an employee in any calendar year.

The Rhode Island statute excludes certain materials from the definition of “personnel files,” including job references and reports from prior employers, records prepared for use in civil, criminal, or grievance proceedings, and certain confidential “managerial records.”

### Tips For Employers

Employers receiving personnel records requests from current or former employees should carefully review any applicable state laws to ensure that they comply with their obligations.

In particular, an employer should be aware of any required timeframe for its response to an employee’s request, and of any limitations on the number of requests an employee is entitled to make within a given time period.

An employer should make certain not to produce any documents – such as medical or investigatory records – that, by statute, do not constitute “personnel records.” Conversely, an employer must ensure that its response to a personnel records request includes all documents required by statute – even if, as is often the case, not all of the documents are stored in a single location.

*Finally, employers should pay particular attention to any unusual requirements under their states’ laws, such as the provision of the Massachusetts statute requiring employers to notify employees whenever negative information is added to their personnel files. ❀*



# New “Protecting Young Victims Act” May Impact Independent Schools

By Gary D. Finley

*In the wake of the sentencing hearing of former USA Gymnastics doctor and convicted child abuser Larry Nassar, and the heart-wrenching testimony of a number of Nassar’s victims, President Donald Trump recently signed into law a bill designed to increase federal protections related to the prevention and the reporting of abuse of amateur athletes who are minors.*



The “Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act” (the “Act”) had overwhelming bipartisan support in both the Senate and the House, and was nearly

identical to a bill passed by the Senate in late 2017. The bill was presented to President Trump on February 7, 2018, and was signed into law a week later.

The Act will have wide-ranging implications for amateur athletics throughout the country. In particular, though it is too soon to be certain what impact various provisions of the Act will have on the independent school world, school administrators, particularly Heads of School and Athletic Directors, would be well advised to consider the Act’s potential impact in at least three respects: (1) the legislation arguably creates additional mandated reporting duties for some school employees; (2) certain provisions of the Act might – in the near future – be adopted at the state level and/or by athletic leagues in a way that would affect independent schools; and (3) certain provisions of the Act might eventually be considered “best practices” and, as such, might provide useful guidance for drafting and revising schools’ athletic and other policies.

## Key Provisions

The Act has three main parts, each of which has the potential to impact independent schools, either directly or indirectly.

### Mandated Reporting.

First, the Act expands upon an existing federal law that imposes reporting requirements upon certain professionals who learn of suspected child abuse while engaged in professional activities on federal land or in a federally operated facility.

The Act greatly expands this reporting requirement by mandating that a wide range of “covered individuals” report suspected child abuse *regardless of location*. The broad definition of “covered individuals” includes, but is not limited to, individuals authorized to interact with minor amateur athletes by “amateur sports organizations” that participate in interstate athletic competitions. Arguably, many independent schools would be considered part of amateur sports organizations that participate in interstate competitions. If so, coaches and athletic administrators of such schools likely fall within the sweep of the statute.

Under the Act, “covered individuals” who learn of facts that give them reason to suspect that a child has suffered an incident of child abuse are required to report that suspicion to a federal or non-federal agency to be identified by the U.S. Attorney General. This, of course, is in addition to any reporting responsibilities that coaches and athletic administrators have under state law and/or school policy.

### Civil Remedy For Personal Injuries.

The Act also amends the section of the U.S. Code that allows individuals who were victims of certain specific offenses (such as federal laws related to forced labor, child

sexual abuse, and child pornography) to sue in federal court for money damages.

In particular, the Act expands the tolling rules for the statute of limitations related to such offenses, such that a plaintiff is now able to sue within ten years after the latest of the following: (1) the date on which the plaintiff reasonably discovers the violation that forms the basis for the claim; (2) the date on which the plaintiff reasonably discovers the injury that forms the basis for the claim; and (3) the date on which the plaintiff reaches eighteen years of age.

This provision, which applies to a wide swath of crimes committed against any minor – *i.e.*, not only a minor athlete – also provides for the potential for increased damage awards. Most significantly, the provision allows a victim to be awarded punitive damages, in addition to the actual damages (or liquidated damages in the amount of \$150,000) and attorney’s fees which were already available under federal law.

Under the Act, a school’s potential financial exposure could be greater in the event it were named as a defendant in a lawsuit involving any of the delineated federal statutes.

### Designation Of United States Center For Safe Sport.

Finally, and most expansively, the Act creates a U.S. Center for Safe Sport (the “Center”), which will have wide-ranging responsibilities aimed at “safeguarding amateur athletes against abuse, including emotional, physical, and sexual abuse in sports...” Among those responsibilities are:

- Maintaining an office for education and outreach that will develop training, oversight practices, policies, and procedures aimed at preventing abuse in all national athletic governing bodies and paralympic sports organizations.

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## New “Protecting Young Victims Act” May Impact Independent Schools

- Maintaining an office to establish mechanisms allowing for the reporting, investigation, and resolution of allegations of sexual abuse in national athletic governing bodies and paralympic sports organizations.
- Requiring that the following persons report any allegation of abuse of a minor amateur athlete to the Center and to law enforcement: all adult members of a national governing body, a paralympic sports organization or any facility under the jurisdiction of either a national governing body or paralympic sports organization, and all adults authorized by such members to interact with a minor amateur athlete.
- Developing reasonable procedures to limit private, one-on-one interactions between an athlete who is a minor and an adult (other than the athlete’s parent or guardian) at a facility under the jurisdiction of either a national athletic governing body or a paralympic sports organization.
- Developing procedures for prohibiting retaliation against individuals who make reports under the statute.
- Formulating an independent audit process to make sure that national governing bodies and paralympic sports organizations are following the mandates of the statute (including staff training, proper reporting of suspected abuse, etc.)
- Creating a mechanism for sharing confidential reports of suspected child abuse with the appropriate governing body and for prohibiting an adult who is suspected of child abuse from interacting with amateur athletes who are minors, until the allegations are resolved.

Because they are chiefly focused upon national entities, the provisions of the Act related to the Center For Safe Sport are unlikely to *directly* affect the independent school world. However, in light of their

breadth and specificity, these provisions may nonetheless have a major impact on independent school policies and procedures.

For example, in its outlining of standards limiting one-on-one interactions between athletes and coaches, creating a mechanism for reporting all allegations of abuse, and creating a procedure for conducting external audits of an organization’s child abuse prevention practices, the Act may well lead to a shift in best practices in these areas in the interscholastic sports world. Thus, schools may want to evaluate their own policies in light of the standards outlined in the Act, and in light of the training programs that will be developed by national-level governing bodies.

### Recommendations For Schools

For a variety of reasons, independent schools might want to wait before revamping their mandated reporting policies based on the provisions of the Act, as it remains unclear whether the Act’s mandated reporting requirements will be interpreted to apply to independent schools in general or to some subset of them.

However, schools should understand that the issue of abuse – and, particularly, sexual abuse – of minors has the attention of lawmakers. Thus, schools would be wise to anticipate further legislation in this area, at the federal and state level, as well as additional rules that may be instituted by athletic conferences.

What is certain is that best practices with regard to the training of coaches and the supervision of athletes continue to evolve. Having state-of-the-art policies and protocols in this area is essential in order to keep and maintain the trust of students and their families, to minimize schools’ legal exposure, and, most importantly, to support the mission of keeping students safe from harm. ❁

## EMPLOYMENT LAW BOOT CAMP

A Two-Day Seminar At  
Schwartz Hannum PC

May 3, 2018 (Thursday)  
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Presented in an interactive seminar format over thirteen hours, Employment Law Boot Camp reinforces participants’ existing knowledge of fundamental employment laws and personnel practices by exploring major risk areas and problem-solving strategies. Experienced attorney instructors will provide extensive written resources, engaging real-life role-plays, and a comprehensive Tool Kit containing essential compliance forms, checklists, and guidance.

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# U.S. Supreme Court Clarifies Permissibility Of Extensions Of Appeal Deadlines

By Brian B. Garrett

*In its recent decision in [Hamer v. Neighborhood Housing Services of Chicago, 138 S. Ct. 13 \(2017\)](#), the U.S. Supreme Court clarified an important issue relating to appeals to the federal circuit courts. At issue in the case was whether a circuit court has jurisdiction to hear an appeal that was filed after the time limit prescribed by the Federal Rules of Appellate Procedure (“FRAP”).*



The Supreme Court held that a court-made rule limiting the length of an extension for filing a notice of appeal is not a “jurisdictional” rule mandating dismissal of the appeal if the time limit is exceeded. Rather, this type of limitation is a “claim-processing rule” that, in appropriate circumstances, may be found to have been waived or forfeited.

## Background

The general issue of the timeliness of appeals in federal civil cases is governed primarily by two sources: Section 2107 of Title 28 of the U.S. Code (a federal statute) and FRAP 4 (a court-made rule).

Though these two sources work in tandem to set a 30-day limit for filing an appeal from an adverse judgment, their language is slightly at odds with respect to extensions of that period. Section 2107(c) states: “The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause.” The statute, however, does not specify how lengthy an extension may be permitted for such cases of “excusable neglect or good cause.”

By contrast, Rule 4(a)(5)(C) of the FRAP appears to prescribe a strict time limit to be applied in *all* cases: “No extension [of time for filing a notice of appeal] may exceed 30 days after the prescribed time [for filing a notice of appeal] or 14 days after the date [of] the order granting the [extension] motion..., whichever is later.”

The Supreme Court in *Hamer* sought to reconcile these competing directives.

## The *Hamer* Litigation

In the underlying action in *Hamer*, the U.S. District Court for the Northern District of Illinois awarded summary judgment dismissing employment discrimination claims brought by a former employee. A week before the appellate filing deadline, the district court provided the plaintiff with a 60-day extension to file a notice of appeal, without objection by the defendant employer.

Pursuant to the district court’s order, the former employee filed her appeal in the U.S. Court of Appeals for the Seventh Circuit prior to the expiration of the 60 days granted by the district court, but in excess of the 30 days prescribed by Rule 4(a)(5)(C) of the FRAP. The Seventh Circuit, however, dismissed the appeal, finding that it did not have jurisdiction to hear the appeal because it was not filed within the 30-day limit set forth in Rule 4(a)(5)(C).

The Supreme Court unanimously reversed, finding that the Seventh Circuit had erroneously treated Rule 4(a)(5)(C) as a jurisdictional bar to its hearing the appeal. In an opinion by Justice Ruth Bader Ginsburg, the Court held that “an appeal filing deadline prescribed by statute will be regarded as ‘jurisdictional’ . . . But a time limit prescribed only in a court-made rule . . . is not jurisdictional; it is, instead, a mandatory claim-processing rule” that may be waived or forfeited.

As its basis for this holding, the Court reasoned that because Congress controls the jurisdiction of federal courts, only Congress can limit their jurisdiction. The Court there-

fore found that because Rule 4(a)(5)(C) (a court-made rule) – and not § 2107 (a federal statute) – capped the permissible length of an extension, the time limitation in Rule 4(a)(5)(C) was not jurisdictional. Thus, the Court concluded, the Seventh Circuit was empowered to determine whether the defendant employer had waived any potential objections to the timeliness of the plaintiff’s appeal.

## Conclusions From *Hamer*

The Supreme Court’s ruling in *Hamer* provides needed guidance regarding the timeliness of appeals, but also serves as a lesson of the importance of fully understanding federal statutes and court rules relating to civil procedure. The plaintiff in *Hamer* followed the order of the district court, but nonetheless fell into a protracted legal battle over appellate procedure. For its part, the defendant employer accepted the district court’s extension without objection and, as a result, may have waived any argument that the appeal should be deemed untimely under Rule 4(a)(5)(C).

Thus, as the *Hamer* decision highlights, it is critical that parties fully understand applicable deadlines and other rules when contemplating whether to appeal or oppose an appeal in a federal case.

*If you have any questions about the *Hamer* decision or its implications, or if you would like assistance with any other litigation matter, please do not hesitate to contact one of our experienced litigation attorneys. ✉*



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## A Spring Cleaning For Your Employment Policies

- **Salary Inquiries** – Effective July 1, 2018, the amended Massachusetts Pay Equity Law will prohibit employers from requesting applicants' salary histories during the hiring process. Massachusetts employers should revise their hiring procedures and protocols to comply with this new restriction.
- **Pay Disparities** – In addition, the Pay Equity Law will require Massachusetts employers to ensure that male and female employees are compensated equally for jobs involving similar skills, effort, responsibilities, and working conditions, except where pay differentials are based on one or more of a list of specified factors. An employer may be able to shield itself from potential liability under the law by carrying out a self-audit aimed at identifying and rectifying any improper pay disparities. (An article detailing recommendations for conducting pay equity audits appears in this edition of our Update.)
- **Sexual And Other Harassment** – When was your organization's anti-harassment policy last updated? Particularly given the explosion of sexual harassment reports in the media in recent months, it is critical for every employer to have a detailed policy affirming its prohibition of sexual harassment in the workplace and advising employees on what to do if they experience or witness sexual harassment. Furthermore, the policy should prohibit not only sexual harassment, but *all* forms of harassment based on a protected characteristic. For instance, Massachusetts employers' harassment policies should specifically include gender identity discrimination.
- **Retaliation** – Retaliation claims continue to predominate among charges filed with the Equal Employment Opportunity Commission and state agencies. In addition, the federal Whistleblower Protection Act

was amended in 2017 to provide that an employee who refuses to obey an order that would require the employee to violate a law, rule, or regulation is protected from retaliation. Therefore, it is critical that every employer have a carefully drafted policy prohibiting retaliation against employees who engage in protected activity, such as reporting harassment or filing a charge of discrimination.

- **Reasonable Accommodation** – Under the Americans with Disabilities Act and equivalent state laws, employers are required to provide reasonable accommodations for otherwise qualified individuals with disabilities. In a July 2017 decision, the Massachusetts Supreme Judicial Court ("SJC") held that an employee who was terminated after testing positive for marijuana as a result of her lawful medical use of marijuana outside of work to treat Crohn's disease was a "qualified handicapped person" under Massachusetts law. As a result, the SJC concluded, the employer was required to engage in an interactive process with the employee to determine if a reasonable accommodation for her medical use of marijuana could be found.

In light of this decision, Massachusetts employers should consider, in consultation with counsel, whether employees' medical use of marijuana may need to be accommodated. In addition, we recommend that every employer ensure that it has a written policy detailing how employees should request workplace accommodations for disabilities and how those requests will be evaluated.

- **Paid Leave** – Finally, a growing number of states, cities, and municipalities have enacted legislation providing for paid sick and/or family leave. For instance, as of January 1, 2018, a new law gives most

employees in New York State the right to take up to eight weeks of paid family leave. This annual eight-week entitlement gradually increases to twelve weeks by 2021. Employers should ensure that their leave policies comply with all paid leave laws in the states and municipalities in which they operate.

*We understand that updating your organization's employee handbook and personnel policies can be a daunting task. We are here to help! We would be happy to audit your current handbook and make specific recommendations about updates and revisions. Please contact us for more information about our handbook audit process, or if you have questions about any of the issues identified above. ✿*





## A Spring Cleaning For Your Employment Policies

By Jacqueline M. Robarge



With winter nearly behind us, now is a perfect time for employers to update their personnel policies and handbooks, based on recent developments in employment

laws and related best practices.

In particular, we encourage employers to consider the following handbook updates and revisions:

- **Pregnancy And Pregnancy-Related Conditions** – The Massachusetts Pregnant Workers Fairness Act, which goes into

effect April 1, 2018, supplements the state’s employment discrimination laws by adding employees who are pregnant or have pregnancy-related conditions (including breastfeeding) as a protected class. Thus, Massachusetts employers should update their listings of protected characteristics to include pregnancy and pregnancy-related conditions.

- **Criminal Background Checks** – The Massachusetts Criminal Offender Record Information (“CORI”) regulations were amended effective April 27, 2017. These changes to the regulations require employ-

ers to modify their criminal background check processes for applicants and employees in a number of respects. For example, there are new requirements for the collection, use, and destruction of CORI acknowledgement forms. In addition, contractors, subcontractors, and vendors are now included within the CORI statute’s definition of “employee.” If your organization conducts CORI checks, we recommend updating your CORI policy to address these new requirements.

*continued on page 11*

### Upcoming Seminars

**April 10, 2018**

**Investigations Workshop:**

**Key Considerations For Investigating Workplace Complaints**

8:30 a.m. – 11:30 a.m.

Schwartz Hannum PC, Andover, MA

**May 3 & 4, 2018**

**Employment Law Boot Camp**

**(Two-Day Seminar)**

May 3: 8:30 a.m. – 4:00 p.m. (EST)

May 4: 8:30 a.m. – 4:30 p.m. (EST)

Schwartz Hannum PC, Andover, MA

**May 8, 2018**

**Independent School Trustee Boot Camp**

8:30 a.m. – 4:30 p.m.

Schwartz Hannum PC - Andover, MA

See a complete listing of upcoming programs at [www.shpclaw.com](http://www.shpclaw.com) under the Seminars heading.

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